Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	WT Docket No. 08-165

To: The Commission

COMMENTS OF THE LEAGUE OF CALIFORNIA CITIES, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE CITY AND COUNTY OF SAN FRANCISCO IN RESPONSE TO THE PETITION FOR DECLARATORY RULING OF CTIA – THE WIRELESS ASSOCIATION

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Dated: September 29, 2008

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INTRODUCTION AND SUMMARY

The League of California Cities,[1] the California State Association of Counties,[2] and the City and County of San Francisco ("collectively California Cities") submit these comments in response to the Petition for Declaratory Ruling ("Petition") of CTIA – The Wireless Association ("CTIA"). California Cities call on the Federal Communications Commission ("Commission") to reject CTIA's Petition promptly. Among other things, CTIA asks the Commission to impose arbitrary and inflexible time limits on local government decisions regarding varied and often complex and controversial applications to site wireless facilities. Because CTIA's Petition

[1] The League of California Cities is an association of all 480 California cities united in promoting the general welfare of cities and their citizens.

[2] The California State Association of Counties is a non-profit corporation made up of the 58 California counties.

directly conflicts with the plain language of 47 U.S.C. Section 332(c)(7) and ignores the explicit legislative history of that section, it should be summarily dismissed.

CTIA's Petition seeks the following rulings, all of which would impose legal requirements that are contrary to the express language of § 332(c)(7). First, CTIA asks the Commission to "clarify" that a local government has "failed to act" for purposes of § 332(c)(7)(B)(v) if it does not decide an application to collocate wireless equipment on existing facilities within 45 days and if it does not decide any other wireless siting application within 75 days. Second, in the event that a local government fails to meet these arbitrary deadlines, CTIA asks the Commission to allow applicants unilaterally to deem the application granted; alternatively, the petition asks the Commission to direct courts to issue an injunction granting the application unless the local government can justify "the delay". Third, CTIA asks the Commission to issue a broad and poorly defined determination that any local ordinance that "effectively" requires a variance in order to construct wireless facilities (whatever that may encompass) is preempted under 47 U.S.C. § 253.[3]

These requests conflict with the balance that Congress struck in the Telecommunications Act of 1996 ("1996 Act"), which was "to preserve the authority of State and local governments over zoning and land use matters except in the limited circumstances" set forth in § 337(c)(7)(B).[4]

The first request, for arbitrary time limits on local government decision-making, flouts the Congressional directive in § 332(c)(7)(B)(ii) that State and local governments be given a "reasonable period of time" to act on siting requests, "*taking into account the nature and scope of such requests.*" (Emphasis added). The categorical time limits proposed by CTIA utterly fail

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[3] CTIA makes a fourth request – relating to whether siting requests can be denied based on the presence of a single wireless provider – that California Cities will not address in these opening comments. California Cities anticipate that other representatives of state and local governments will address this request.

[4] H.R. Conf. Rep. No. 104-458 (1996) ("Conference Report"), pp. 207-208.

to take into account the nature, scope, or any of the specific circumstances relating to particular requests. CTIA's request directly contradicts Congressional intent, both as expressed in the language of § 332(c)(7)(B)(ii) and as made explicit in the Conference Report, that wireless siting requests would be subject to "the generally applicable time frames for zoning decisions" and not receive "preferential treatment . . . in the processing of requests."[5] CTIA's request is also based on the wrong subsection of § 332(c)(7). The "failure to act" language in § 332(c)(7)(B)(v) is intended solely as a jurisdictional provision that defines the period for bringing court actions. It does not provide any substantive rights, unlike the more explicit § 332(c)(7)(B)(ii). Moreover, the Commission itself has wisely rejected wireless industry requests to set arbitrary time limits for Commission decisions under § 332(c)(7)(B)(v), concluding that rigid time limits would "not afford the Commission sufficient flexibility to account for the particular circumstances of each case."[6] Following the same approach here is both legally required and eminently sensible.

Second, once the Commission dismisses CTIA's proposed rule prescribing unlawful time limits, it should likewise dismiss as moot CTIA's proposed remedy for that unlawful rule. In any event, CTIA's request that the Commission should allow carriers to unilaterally "deem granted" siting applications that are not decided within CTIA's proposed time limits would usurp authority that Congress reserved for the courts. If local governments violate any of the restrictions placed on them by § 332(c)(7)(B)(i)-(iii), including the requirement to make decisions in a reasonable time given the nature and scope of the request, Congress vested "exclusive jurisdiction" in the courts to fashion remedies for such violations.[7] CTIA blinds itself to the fact that Congress directed the courts, not CTIA's members, to decide when a violation has occurred and what the appropriate remedy should be.

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[5] Conference Report, p. 208.

[6] *In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 15 FCC Rcd 22821, ¶ 14 (2000).

[7] Conference Report, p. 208.

Third, CTIA's proposal to preempt under § 253 ordinances that effectively require a "variance" relies on a discredited interpretation of § 253 that conflicts with the Commission's own interpretation of that provision. In addition, the request conflicts with § 332(c)(7), which expressly preserves local zoning requirements and trumps any contrary interpretation of § 253. Rather than banning variance requirements, Congress explicitly anticipated that "a request for placement of a personal wireless service facility [could] involve[] a zoning variance."[8] As a practical matter, CTIA fails to provide any clear boundaries on the potentially sweeping preemption it seeks.

CTIA's petition is directly at odds with § 332(c)(7), and the Commission may not lawfully adopt CTIA's proposals. Accordingly, the Commission should dismiss the petition without hesitation.

DISCUSSION

I. THE COMMISSION SHOULD REJECT CTIA'S PROPOSAL TO IMPOSE ARBITRARY AND INFLEXIBLE TIME LIMITS ON LOCAL ZONING DECISIONS.

A. The Plain Words and Explicit Legislative Intent of Section 332(c)(7) Show that Congress Intended Local Governments to Follow Their Generally Applicable Procedures and Time Frames for Land Use Decisions and Not Give Preferential Treatment to the Wireless Industry.

CTIA asks the Commission to "clarify" that a local government has "failed to act" for purposes of § 332(c)(7)(B)(v) if it does not decide an application to collocate wireless equipment on existing facilities within 45 days and if it does not decide any other wireless siting application within 75 days. Section 332(c)(7)(B)(v) states in part: "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act,

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[8] *Id.*

commence an action in any court of competent jurisdiction." CTIA argues that Congress did not define "failure to act" and that the Commission should step in the breach to determine when a decision is sufficiently delayed to constitute a failure to act.[9]

CTIA is looking to the wrong provision of § 332(c)(7) to ascertain Congressional intent regarding the time local govemments should be allowed to decide wireless siting applications. Section 332(c)(7)(B)(v) is a jurisdictional provision that only defines the period for bringing court actions. CTIA's request that the Commission rely on § 332(c)(7)(B)(v) to establish a time period for local governments to act is not surprising, since the more applicable provision expressly prevents the Commission from taking such action.

Unlike § 332(c)(7)(B)(v), § 332(c)(7)(B)(ii) directly speaks to the substantive issue of the time period that local governments are allowed for deciding wireless siting requests. Section 332(c)(7)(B)(ii) states: "A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed, taking into account the nature and scope of such request." Three points are immediately apparent from the plain words of § 332(c)(7)(B)(ii), all of which are fatal to CTIA's proposal.

First, Congress chose not to impose any rigid time limits on local government decision making. Instead, Congress opted to use the flexible phrase "reasonable period of time" to provide the standard for timely action.

Second, by including the phrase "taking into account the nature and scope of such request," Congress recognized that siting requests vary significantly in the amount of controversy and complexity they present, depending primarily on the nature of the proposed facilities (*e.g.*, size and appearance) and the proposed location of the facilities (*e.g.,* in an

[9] CTIA Petition, p. 7.

industrial district versus a residential district). A small antenna in an industrial district may not require a hearing or any significant review, whereas a large antenna in a residential or historic district that is strongly opposed by neighborhood residents may require significant staff analysis (including, as discussed below, potentially an environmental impact report), one or more hearings and associated written findings.

Third, Congress prescribed that the reasonable period of time to act on siting applications begins when the request has been "duly" filed. The dictionary defines "duly" to mean "in a proper manner."[10] Thus, Congress recognized that the reasonableness of a period of time to decide an application is affected by the time it takes the applicant to submit the required information to the reviewing authority. In defiance of § 332(c)(7)(B)(ii), CTIA's proposed categorical time limits appear to be triggered when an application is first filed (regardless of whether all necessary information is provided),[11] not when a complete application has been presented.

The plain words of § 332(c)(7)(B)(ii) are sufficient to defeat CTIA's request for the Commission to specify rigid time limits. However, if there is any doubt about whether the Commission could, consistent with § 332(b)(7), impose CTIA's or any other fixed time limits on State and local governments, the Conference Report dispels that doubt. Conference reports are considered the most reliable evidence of federal legislative intent because they represent the final statement of the terms agreed to by both houses.[12] Here, the Conference Report explicitly explains the intent of § 332(c)(7)(B)(ii):

> Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility

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[10] *The American Heritage® Dictionary of the English Language, Fourth Edition*. Retrieved September 10, 2008, from Dictionary.com website: http://dictionary.reference.com/browse/duly

[11] CTIA Petition, pp. 24-25

[12] *Auburn Housing Auth. v. Martinez*, 277 F.3d 138, 147 (2d Cir. 2002).

> involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. *It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.*[13]

This paragraph, which CTIA simply overlooks in its Petition, shows that Congress intended to foreclose precisely the "preferential treatment" CTIA is requesting. Congress intended for local governments to follow the "generally applicable time frames for zoning decisions" and not to give preference to wireless carriers in processing zoning requests. By proposing that the Commission fix time limits specifically for the benefit of the wireless industry – time limits that bear no relation to a local government's generally applicable time frames – CTIA would have the Commission issue a directive that flouts the clear intent of Congress.

Congress' deference to the usual local procedures and time frames for deciding land use matters is consistent with its general approach in § 332(c)(7). One of the primary purposes of section 332(c)(7) is "to protect the legitimate traditional zoning prerogatives of local governments."[14] Congress made a conscious choice to preserve local authority and indeed rejected the House legislation that would have allowed the Commission to regulate directly the placement of wireless facilities.[15] Instead, Congress added § 332(c)(7), which "prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters, except in the limited circumstances" set forth in § 332(c)(7)(B).[16] Deference to the generally applicable time frames for local zoning decisions is just one aspect of Congress' general deference to state and local governments regarding wireless siting.

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[13] Conference Report, p. 208 (emphasis added).

[14] *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 727 n.5 (9th Cir. 2005).

[15] *See* H.R. Rep. No. 104-204(I), § 107, at 94 (1995).

[16] Conference Report, pp. 207-208.

B. The Commission Itself Has Recognized that Rigid Time Limits to Decide Wireless Siting Matters Are Inconsistent with Section 332(c)(7) and Are Bad Policy

On two occasions, the Commission has considered whether it should impose rigid time limits on decisions related to wireless siting requests. On both occasions, the Commission rejected such time limits in favor of flexible time periods that accommodate the circumstances of individual cases.

In 1997, the Commission proposed a rule to determine when a local government has "failed to act" for purposes of petitions under § 332(c)(7)(B)(v) claiming improper regulation based on radio frequency emissions.[17] The Commission's analysis concisely reflects the requirements of § 332(c)(7):

> . . . while Congress provided no specific definition of the term 'failure to act,' under Section 332(c)(7)(B)(ii) of the Communications Act, decisions regarding personal wireless service facilities siting are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the Conference Report states that the time period for rendering a decision will be the usual period under such circumstances. Congress also stated that it did not intend to confer preferential treatment upon the personal wireless service industry in the processing of requests, or to subject that industry's requests to anything but the generally applicable time frames for zoning decisions. Therefore, we propose to determine whether a state or local government has 'failed to act' on a case-by-case basis taking into account various factors including how state or local governments typically process other facility siting requests and other RF-related actions by these governments.[18]

The Commission recognized the following key points: (1) Congress provided considerable guidance about the permissible time for local decisions in § 332(c)(7)(B)(ii); (2) the Conference

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[17] *In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 FCC Rcd 13494, ¶ 138 (1997) (footnotes omitted) ("*RF Procedures Notice*"). In 2000, the Commission decided not to adopt a final rule on this issue, concluding that this and other procedural issues were best addressed through case-by-case adjudication. *In the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934* ("*RF Procedures Decision*"), 15 FCC Rcd 22821, ¶ 20 (2000).

[18] *RF Procedures Notice*, 12 FCC Rcd 13494, ¶ 138 (footnote omitted).

Report provides a clear discussion of Congressional intent; (3) Congress intended that the appropriate time period for local government decisions be the usual period that is required for such zoning decisions; and (4) Congress intended not to confer any preferential treatment on the wireless industry in making zoning decisions.

In light of this clear Congressional intent, the Commission did not (nor could it) propose any inflexible time limits to define when a local government had failed to act. Instead, the Commission appropriately proposed a case-by-case determination of the reasonableness of the time period in question.

In that same rulemaking proceeding, wireless industry representatives urged the Commission to impose upon itself a time limit for deciding petitions relating to wireless siting requests. The industry members advocated that the Commission make its decision within 30 days after the completion of the comment cycle – or effectively 75 days after a petition was filed.[19] The Commission rejected the wireless carriers' request, for policy reasons that apply to CTIA's proposal with equal force:

> . . . we decline to adopt the recommendation of several carriers that we impose a 30 day deadline for our own resolution of petitions filed under Section 332(c)(7)(B)(v). While we understand the need to facilitate the build-out process and the need for carriers to have fast resolution of siting disputes in order to allow for faster build-out, *we are not prepared to adopt a time limit for resolving petitions for relief under Section 332(c)(7)(B)(v) because we are concerned that doing so will not afford the Commission sufficient flexibility to account for the particular circumstances of each case.*[20]

Thus, in 2000, the Commission recognized that it would be bad policy to constrain itself to decide potentially complex matters related to wireless siting within 75 days. The Commission agreed with the carriers that prompt resolution of siting disputes was important. But the

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[19] Because the Commission adopted a pleading cycle of 30 days for oppositions and 15 days for replies, the Commission was considering whether to allow itself a total of 75 days for decision after the submission of a wireless carrier's petition. *RF Procedures Decision*, ¶¶ 11, 14.

[20] *Id.*, ¶ 14 (emphasis added).

Commission was appropriately concerned that each case would present different facts and circumstances that could significantly affect the time required for adequate review and a thoughtful decision. Wisely, the Commission rejected the proposed fixed time limit in favor of retaining the necessary flexibility.

As will be explained in further detail in the next section, wireless siting requests presented to local governments involve a wide range of complexity, controversy and process requirements – a range that almost certainly equals or exceeds the variation presented by petitions to the Commission. For the same reason the Commission rejected rigid time limits for its own decisions, it should reject such time limits for local government decisions.

C. The Time Required to Decide Wireless Siting Requests Varies Considerably Depending on the Nature and Scope of the Request

In attempting to justify its arbitrary time limits, CTIA uses specious logic. According to CTIA, because large numbers of applications have been decided within the proposed time limits, those limits must set a reasonable time period for reaching a final decision.[21] The folly of this line of reasoning is obvious. Wireless siting applications present a wide divergence of circumstances. A time frame that works for the majority of relatively easy requests will not necessarily work for the minority of complex or controversial requests.

CTIA itself acknowledges that the "amount of time necessary to process a wireless siting application may vary depending upon the type of approval sought."[22] But CTIA apparently believes that the only type of approval that makes a difference is whether or not the applicant seeks to collocate on an existing facility.[23] This view overlooks numerous other factors that play a larger role in driving the time required for decisions – two of the most important being the

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[21] CTIA Petition, pp. 24-26.

[22] *Id.*, p. 24.

[23] *Id.*

nature of the proposed location and the size and visual impact of the proposed facilities. Congress recognized the importance of these factors to the decision-making process when it explained in the Conference Report that a State or local government that grants a permit in a commercial district is not required to grant a permit to a competitor's 50-foot tower in a residential district.[24]

Contrary to CTIA's binary view of the world, local governments often make distinctions among many different types of districts and locations in specifying the application and approval requirements. For example, under the County of San Diego's Wireless Telecommunications Facilities Ordinance, applications for wireless permits are categorized into one of four tiers, depending on the visibility and location of the proposed facility.[25] Low visibility structures in an industrial zone generally must meet lesser requirements than a large tower in a residential zone.[26]

Similarly, the City and County of San Francisco Planning Department has developed guidelines for siting of wireless facilities in which it ranks *seven* types of location according to the Department's preference for the use of such locations.[27] Preferred locations include public buildings, such as police or fire stations; co-location sites; and industrial or commercial structures.[28] Limited Preference locations include mixed-use buildings (*e.g.*, housing above commercial space) in high density districts and buildings in certain neighborhood commercial

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[24] Conference Report, p. 208.

[25] *Sprint Telephony PCS v. County of San Diego*, 2008 U.S. App. LEXIS 19316, (9th Cir. 2008) ("*Sprint*"). In this decision, an en banc court of the Ninth Circuit upheld the County of San Diego ordinance.

[26] *Id.* at * 3.

[27] Planning Department, City and County of San Francisco, *Wireless Telecommunications Services Facilities Siting Guidelines*, August 15, 1996, updated by San Francisco Planning Commission Resolution No. 16539, March 13, 2003 ("*San Francisco Guidelines*"), available at http://www.sfgov.org/site/planning_index.asp?id=37466.

[28] *San Francisco Guidelines*, Section 8.1. As explained below, the *San Francisco Guidelines* point out that applications to place new facilities on co-location sites are subject to other policies designed to limit visually obtrusive structures.

districts.[29] Disfavored sites include buildings in many residential districts.[30] For Limited Preference and Disfavored sites, applicants need to show, among other things, good faith efforts to use Preferred locations for the geographic service area, why such efforts were unsuccessful, and that the requested site is necessary to meet the applicant's service needs.[31] These guidelines show that, in urban settings with numerous types of zoning districts, the number and complexity of issues posed by an application will vary considerably based on the applicant's choice of location.

Likewise, the size and visual impact of the applicant's proposed facilities can have a major impact on the extent of analysis and process required. For example, although co-location facilities are a favored location under the *San Francisco Guidelines*, other city policies attempt to avoid the location of so many facilities on a structure such that the site resembles an "antenna farm."[32] Similarly, under the County of San Diego's ordinance, generally no more than three facilities are allowed at one site, unless a finding is made that collocation of more facilities is consistent with community character. Thus, contrary to CTIA's one-size-fits-all time limit for co-location requests, applications that involve multiple large and visually obtrusive antennas are likely to trigger policies that require considerably more time for decision than others that simply add one small antenna to an existing site with one or two antennas.

D. CTIA's Proposed Time Limits Are Wildly Inconsistent with the Time Required to Decide Complex or Contested Wireless Siting Applications

CTIA also blinds itself to the generally applicable procedural requirements of local zoning laws, which, as discussed above, Congress expected local governments to follow when

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[29] *Id.*, as amended by Planning Commission Resolution No. 16539.

[30] *San Francisco Guidelines*, Section 8.1.

[31] *Id.*

[32] *Id.*

reviewing wireless siting applications.[33] Local laws are often designed to require less review and fewer procedural requirements for sites that are proposed in industrial and other areas where wireless facilities are more compatible with the surroundings. Although some wireless siting applications might be relatively easy to process, requests to construct facilities in disfavored locations, which often elicit community opposition, will likely require considerable time to review and careful attention to procedural requirements in order to yield a decision that can be defended in court. On top of the significant staff time needed to analyze complex applications and prepare recommendations for decision-makers, local laws frequently require zoning decisions to be made at public hearings at which members of the public may testify. Such public hearings must comply with the notice requirements of applicable law.

For example, under San Francisco law, a hearing on a conditional use permit application (which is often required for wireless siting requests), must be preceded by at least 20 days' notice in a newspaper and at least 10 days' notice by mail to nearby property owners.[34] In California, the Brown Act imposes additional and exacting notice, agenda and decision-making requirements.[35] Further adding to the procedural complexity is the fact that, under the Brown Act, a majority of decision-makers may not privately discuss or deliberate upon a zoning matter that will appear on the agenda for a public meeting. In addition, under generally applicable local zoning laws, initial decisions of a zoning board are often subject to an appeal. Appeal procedures typically involve affording potentially aggrieved parties notice of a zoning board decision and an adequate time to file an appeal (*e.g.*, 30 days in San Francisco),[36] an opportunity for parties to present written information in support of and in opposition to an appeal, and an

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[33] Conference Report, p. 208.

[34] San Francisco Planning Code § 306.3.

[35] California Government Code § 54950 *et seq.*

[36] San Francisco Planning Code § 308.1

opportunity to testify at a public hearing. Again, under California's Brown Act, deliberations and determinations of the appellate body may only be made at a properly noticed public meeting. Throughout the decision-making process, local governments must be mindful of the requirements of Section 332(c)(7)(B)(iii) that decisions to deny wireless siting requests must be in writing and supported by substantial evidence contained in a written record.[37] Local procedures must be designed to accommodate these federal procedural requirements.

In addition, the California Environmental Quality Act ("CEQA") imposes extensive procedural requirements that are potentially applicable to wireless siting decisions in California. Depending on the potential environmental effects (including effects on historic resources) of an application, CEQA may require California's local governments to determine measures to mitigate adverse environmental effects or to prepare a thorough environmental impact report before making any decisions related to an application.[38] Each step in the decision-making process must satisfy statutory notice requirements, and some steps require public review periods of 30 days or more. Many government determinations or actions under CEQA, including a finding that the project is exempt from CEQA, are subject to appeal within the local government and then to challenge in the courts.[39] By order of the California Public Utilities Commission, local jurisdictions are generally responsible for complying with the requirements of CEQA with respect to individual wireless siting requests.[40] If CEQA applies to a project, its requirements

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[37] To comply with this requirement, the courts generally require that local governments "issue a written denial separate from the written record" and the written detail "contain[s] a sufficient explanation of the reasons for the . . . denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Southwest Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 60 (1st Cir. 2001)

[38] See generally *Guidelines for the Implementation of CEQA*, California Code of Regulations, title 14, chapter 3 ("*CEQA Guidelines*"), available at http://www.ceres.ca.gov/topic/env_law/ceqa/guidelines/ (last checked September 26, 2008). A brief overview of the rigorous requirements of CEQA can be found in the Introduction to the *CEQA Guidelines*.

[39] See generally *CEQA Guidelines*, §§ 15060-15065.

[40] California Public Utilities Commission General Order 159A, § II.B, available at http://162.15.7.24/PUBLISHED/Graphics/611.PDF (last checked September 26, 2008).

often add several months to the decision timeline. Even if the local government finds that CEQA does not apply, opponents of the application can delay a decision through CEQA-based appeals and court challenges.

A typical procedural path of a controversial siting request is illustrated in *MetroPCS, Inc. v. City and County of San Francisco.*[41] There, MetroPCS sought to install six panel antennas, each five feet long, in an area zoned as a neighborhood commercial district. Under local law, such applications required a conditional use permit, which in turn required a decision at a public meeting by the Planning Commission. After the Planning Department staff analyzed the application, prepared a recommendation for the Planning Commission, and gave the required notice to the public, the Planning Commission held a public meeting at which it decided to approve the application. At a later duly notice public meeting, the Commission adopted written findings and a written decision. Approximately one month after the Planning Commission's decision, a neighborhood resident filed an appeal with the San Francisco Board of Supervisors ("Board"). The appeal was supported by a petition signed by some 80 local property owners, representing almost 60% of the land area within 300 feet of the proposed site. Hundreds of other San Francisco residents signed a petition opposing the proposed site. In accordance with local zoning procedures, the Board held a public hearing on the appeal at which representatives of MetroPCS opposed the appeal and many community members spoke in favor of the appeal. The Board unanimously voted to overturn the Planning Commission's decision, and, one week later, adopted a written decision explaining the basis for its decision.[42]

All of these steps – staff analysis of the proposal, preparation of a staff recommendation, notice to the public, initial Planning Commission hearing, Planning Commission adoption of a written decision, notice of the Planning Commission decision, the thirty-day appeal period

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[41] 490 F. 3d 715 (9th Cir. 2005).

[42] *Id.* at pp. 718-719.

provided by local law,[43] appeal of the Planning Commission decision, Board hearing on the appeal, and Board adoption of a written decision – took place in just over six months[44] – a short time period for such a complex and controversial matter, particularly considering the notice requirements for the public meetings and the 30-day appeal period. One reason San Francisco was able to accommodate all of these requirements in a relatively short time period is that its Planning Commission and Board of Supervisors generally hold public meetings on a weekly basis. Smaller jurisdictions that do not have such frequent public meetings would likely require more time.

CTIA simply fails to acknowledge that the many state and local procedural requirements that apply generally to zoning matters will likely add considerably to the decision-making timeline. CTIA's proposed rigid timeline would require state and local governments to rewrite their zoning laws and their general procedural laws to grant special exemptions and preferences to wireless siting applications. Congress could not have been clearer that it did not intend to require state and local governments to give such "preferential treatment to the personal wireless service industry in the processing of requests."[45]

E. There is No Need for the Commission to Devote Its or the Parties' Time and Resources to Making a Rule Governing the Time to Decide Wireless Siting Requests

As explained above, § 332(c)(7) plainly prohibits the Commission from mandating CTIA's (or any other) proposal for rigid time limits. Instead, Congress specified a flexible standard – a reasonable period of time taking into account the nature and scope of the request.[46] Given the tremendous variation in the nature of requests and the state and local land use laws

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[43] San Francisco Planning Code § 308.1.

[44] See *MetroPCS*, 400 F.3d at 718-19.

[45] Conference Report, p. 208.

[46] Section 332(c)(7)(B)(ii).

under which such requests are to be reviewed, the only rule that the Commission could enunciate that would be consistent with Congressional intent would be one that mimicked the guidance that Congress has already supplied. Indeed, as noted above, when the Commission last considered adopting a rule interpreting "failure to act" in 1997, it proposed that such determinations be made on a "case-by-case basis."[47]

A Commission "rule" of this nature would not supply any useful guidance to the courts in deciding whether a local government has violated § 332(c)(7)(B)(ii) and thereby "failed to act" under § 332(c)(7)(B)(v). Courts are uniquely well suited to making case-by-case determinations based on the facts presented to them. It would be a poor use of the Commission's and the parties' resources for the Commission to embark on an effort that cannot improve upon the guidance that Congress has already supplied.

II. THE CTIA PROPOSAL TO ALLOW APPLICANTS TO "DEEM GRANTED" SITING REQUESTS THAT ARE NOT DECIDED WITHIN CTIA'S ARBITRARY TIME LIMITS VIOLATES § 332(c)(7)

A. As an Initial Matter, the Commission Should Reject CTIA's "Deem Granted" and Alternative Proposals Because They Are Advanced as a Remedy for Violation of an Unlawful Rule.

CTIA's second proposal is for the Commission to mandate certain remedies in the event a local government has not decided a wireless siting request within CTIA's rigid and unreasonable time limits. Specifically, CTIA urges the Commission to allow applicants to unilaterally deem such requests granted, or alternatively, to require courts to establish a presumption requiring the granting of the request unless the local government can justify "the delay." Although CTIA presents this as an independent proposal, in reality, it is only relevant if the Commission (improperly) adopts the fixed timelines that CTIA proposes.

The Commission need not spend any time addressing this proposal. As shown in the previous section, the Commission may not lawfully adopt the underlying rule – the 45- and 75-

[47] *RF Procedures Notice*, 12 FCC Rcd 13494, ¶ 138 (1997)

day time limits – for which CTIA is seeking a mandated remedy. Because the underlying rule is unlawful, there is no reason for the Commission to analyze the legality and wisdom of a remedy for that rule. Once the Commission rejects CTIA's proposed time limits, it may and should reject CTIA's proposed remedies as moot.

B. In Any Event, CTIA's Proposed Remedies Conflict with the Exclusive Jurisdiction that Congress Conferred on the Courts to Resolve Disputes Between Carriers and Local Governments.

If the Commission nevertheless chooses to consider CTIA's proposal for mandatory remedies, the Commission should conclude that the proposal directly conflicts with the exclusive jurisdiction that Congress conferred on the courts.

The Conference Report plainly and explicitly explains the intent of Congress with respect to the judicial review provision of § 332(c)(7)(B)(v):

> The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. *It is the intent of the conferees that* other than under section 332(c)(7)(B)(iv) . . . *the courts shall have exclusive jurisdiction over all other disputes arising under this section.* Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile service] facilities should be terminated.[48]

Thus, other than petitions relating to improper regulation based on the effects on radio frequency emissions, courts have exclusive jurisdiction to resolve complaints that local governments have violated § 332(c)(7).[49]

CTIA's preferred remedy is for the Commission to issue a rule that would, in the event an applicant believes that a local government has exceeded its time limit, allow applicants to unilaterally deem the request granted *and begin construction without any further order of a*

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[48] Conference Report, p. 208 (emphasis added).

[49] Accord *In the Matter of Petition of Cingular Wireless LLC for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance Are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, 18 FCC Rcd 13126, fn. 90 (2003)

court.[50] Such a rule would directly conflict with the requirement that persons adversely affected by a failure to act "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[51] Congress directed applicants aggrieved by a failure to act to seek a remedy in court, not to automatically and instantaneously receive the remedy they desire once an arbitrary deadline has passed. The role of a court under § 332(c)(7) is to decide if a violation has occurred, and, if so, to decide the appropriate remedy. While one remedy that a court might impose for a failure to act could be to grant the application forthwith, a court could also decide, based on the facts presented, that a different remedy would be appropriate, such as to allow the local authorities additional time to act or to grant the application with certain conditions. CTIA's proposal usurps the authority of the courts and mandates a single remedy that would apply in all failure to act cases. Because CTIA's proposal automatically gives applicants the complete remedy they desire, they would have no reason to go to court, and the courts' jurisdiction over failure to act cases would be rendered meaningless.[52]

CTIA's alternative remedy would also usurp (albeit more subtly) the exclusive jurisdiction of the courts. CTIA asks the Commission to direct the courts to grant the applicant's request unless the local jurisdiction can justify "the delay." This alternative proposal would turn the burden of proof in preemption cases on its head.[53] It would also intrude upon the discretion

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[50] CTIA Petition, pp. 28-29 (a deemed grant rule would "ensure that applicants have the option to begin construction (if they wish) following the failure to act, while the zoning process or litigation proceeds.")

[51] Section 332(c)(7)(B)(v).

[52] CTIA's "deem granted" proposal raises other practical issues and concerns. After an application has obtained any necessary land use or zoning approvals, often a building permit will be required to make sure that the wireless facility conforms to all building code requirements. If such building permits were also to be deemed granted, an important step to safeguard public safety would also be removed from the process.

[53] *See VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830 (7th Cir. 2003) (carrier has burden of proof on substantial evidence claim); *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Wayland*, 231 F. Supp. 2d 396, 408 (D. Mass. 2002) (carrier has burden of proof on other section 332(c)(7) claims).

that Congress conferred on the courts to fashion remedies in failure to act cases. As noted above, courts may conclude in certain cases that granting the request is not the appropriate remedy and that a compromise remedy better suits the facts of the case. Congress explicitly directed the courts, not the Commission, to decide the remedies that should apply when there is a violation of § 332(c)(7).

Moreover, CTIA does not (and cannot) ground its alternative remedy in any provision or phrase in § 332(c)(7). When it comes to remedies for violations, there is no ambiguous language for the Commission to interpret. Instead, Congress vested the courts with exclusive jurisdiction to determine appropriate remedies. CTIA is asking the Commission to invade the province of the courts and establish a uniform rule constraining the courts' choices.

Alliance for Community Media v. Federal Communications Commission ("ACM")[54] does not rescue either the remedies or the underlying rule that CTIA proposes. In *ACM*, the court upheld Commission rules interpreting ambiguous language in 47 U.S.C. § 541 prohibiting local franchising authorities from "unreasonably refus[ing] to award" competitive cable franchises. Here, unlike § 541, whatever ambiguities may reside in Congress's directive that local governments shall decide siting requests "within a reasonable period of time ... taking into account the nature and scope of such request,"[55] § 332(c)(7) is clear and unambiguous that rigid, one-size-fits-all time limits are outside the realm of what Congress permitted. As shown above, the Conference Report makes it abundantly clear that local governments are in full compliance with § 332(c)(7) if they follow their general zoning procedures to decide wireless zoning requests.[56] Also as previously shown, such procedures produce great variation in the time required to decide different types of request and are incompatible with fixed time limits. Nor

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[54] 529 F.3d 763 (9th Cir. 2008)

[55] § 332(c)(7)(B)(ii).

[56] Conference Report, p. 208.

does *ACM* support CTIA's proposed remedies. Contrary to the court's conclusion in *ACM*, here both of CTIA's remedies are fundamentally at odds with the exclusive jurisdiction that Congress vested in the courts to fashion remedies for violations of § 332(c)(7). CTIA cannot point to any ambiguous language anywhere in § 332(c)(7) that even opens the door to Commission interpretation of appropriate remedies for a failure to timely decide a siting request. All that Congress said was that persons aggrieved by a failure to act should commence an action in the courts, which have exclusive jurisdiction over such disputes.

The Commission should not be persuaded by the superficial resemblance between CTIA's proposal and the Commission's rules upheld in *ACM*. At bottom, *ACM* affirmed the Commission's rules because the court concluded they were consistent with § 541. In contrast, CTIA's proposals fundamentally clash with Congress's manifest intent in § 332(c)(7), and, therefore, should be rejected.

III. CTIA' S PROPOSAL THAT THE COMMISSION PREEMPT ANY LOCAL LAW REQUIRING A VARIANCE RELIES ON A DISCREDITED INTERPRETATION OF 47 U.S.C. § 253 AND IS CONTRARY TO § 332(c)(7).

A. CTIA's Incorrect Interpretation of § 253 Has Been Repudiated by the Ninth Circuit and Conflicts with the Commission's Interpretation

CTIA asks the Commission to preempt, under 47 U.S.C. § 253, any local law that requires "or effectively requires" a variance for every wireless siting application.[57] CTIA asserts that courts have preempted local laws that impose onerous requirements for wireless siting applications, including "unfettered discretion" to deny permits and subjective aesthetic design requirements.[58] However, all of the court decisions that CTIA cites are from the Ninth Circuit or district courts within the territory of the Ninth Circuit, and all of those decisions are based on the

[57] CTIA Petition, p. 35. As discussed below, CTIA's precise request is far from clear, and CTIA employs different formulations for the order it seeks.

[58] *Id.*

Ninth Circuit's 2001 decision in *Auburn v. Qwest Corp.*[59] In *Auburn*, the court held that, to prevail on a § 253(a) preemption challenge, plaintiffs need only show *a possibility* that the law in question *could* prohibit telecommunications service.[60] CTIA did not point out that, at the time of CTIA's petition, one of the Ninth Circuit decisions CTIA relied on, *Sprint Telephony PCS v. County of San Diego*,[61] was being reheard en banc.[62] The Ninth Circuit has now issued a unanimous en banc decision overruling *Auburn* and holding that a plaintiff suing a local government under § 253(a) must show actual or effective prohibition.[63] Applying this standard to the local law in question, which *inter alia* granted the zoning board discretion to deny applications and imposed subjective aesthetic requirements, the court had "no difficulty" concluding that the ordinance passed muster under § 253(a).[64]

The repudiation of *Auburn* in *Sprint* completely and unequivocally discredits the premise of CTIA's proposal. All of the court decisions CTIA cites rely on the overruled *Auburn* standard to invalidate local laws. In addition, those decisions conflict with the Commission's interpretation of § 253(a) as barring local laws that "prohibit or have the effect of prohibiting

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[59] 260 F.3d 1160 (9th Cir. 2001), overruled by, *Sprint Telephony PCS v. County of San Diego*, 2008 U.S. App. LEXIS 10421 (9th Cir. 2008).

[60] *Id.* at 1175.

[61] 490 F.3d 700 (9th Cir. 2007)

[62] *Sprint Telephony PCS v. County of San Diego*, 2008 U.S. App. LEXIS 10421 (9th Cir. 2008)(ordering that the three-judge panel decision that was being reheard en banc shall not be cited as precedent to any court of the Ninth Circuit).

[63] *Sprint Telephony PCS v. County of San Diego,* 2008 U.S. App. LEXIS 19316, * 14 - * 15 (9th Cir. 2008)(" *Sprint*") (concluding that *Auburn* was based on a misreading of § 253(a) that incorrectly interpreted the word "may" to mean "might possibly")

[64] *Id.*, * 20.

telecommunications service."[65] In fact, the *Sprint* court pointed out that its corrected interpretation was consistent with the Commission's.[66]

Under the proper interpretation of § 253(a) espoused by the *Sprint* court and the Commission, CTIA has no basis to ask the Commission to preempt local laws that require a variance. CTIA cannot show that the requirement to obtain a variance *per se* creates an outright or effective prohibition of telecommunications service. The *Sprint* court put it well: "It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance – the provision of wireless services and other valid public goals such as safety and aesthetics."[67] CTIA's preemption proposal is based on an incorrect interpretation of § 253(a) and should be rejected.

B. The Proposed Preemption of Variance Requirements Violates § 332(c)(7), Which Trumps § 253(a) in Matters Relating to Siting of Wireless Facilities

Even if the Commission were (incorrectly) to conclude that the need to obtain a variance in order to construct wireless facilities violates § 253(a), the Commission should nevertheless reject CTIA's proposal because it conflicts with §332(c)(7). As explained below, with respect to siting of wireless facilities, § 332(c)(7) explicitly trumps § 253, and § 332(c)(7) expressly preserves variance requirements and other local zoning authority over wireless siting decisions.

Section 332(c)(7) is an overriding safe harbor provision for the exercise of local land use authority over wireless facilities. Section 332(c)(7)(A) states that "*nothing in this chapter* [*i.e*, the entire Communications Act[68]] shall limit or affect the authority" of local governments "over

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[65] *In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park*, 12 FCC Rcd 14191, ¶ 26 (1997).

[66] *Sprint*, 2008 U.S. App. LEXIS 19316, * 15.

[67] *Id.*, * 20 - * 21.

[68] 47 U.S.C. Chapter 5 comprises 47 U.S.C. § 151 through § 615b and thus includes §253.

decisions regarding the placement, construction, and modification of personal wireless service facilities," subject only to the limitations in subsection (B) (emphasis added). By using the sweeping phrase "nothing in this chapter," Congress could not have been more clear that it intended § 332(c)(7) to override any other provision in the Communications Act that may be in conflict, including § 253.[69]

CTIA's proposal to have the Commission broadly preempt any ordinances "effectively" requiring a variance directly conflicts with Congress' preservation of local zoning authority. In adopting § 332(c)(7), Congress rejected the House proposal to allow the Commission to make wireless siting decisions. Instead, Congress fashioned § 332(c)(7) to prevent Commission preemption of local land use decisions and to preserve the authority of local governments over zoning and land use matters.[70] The Conference Report specifically recognized that the land use decision-making processes Congress is preserving may "involve[] a zoning variance."[71] Thus, CTIA is once again urging the Commission to ignore Congress' clear allocation of authority in § 332(c)(7). Under that section, the Commission has no authority to preempt ordinances that require variances.

C. CTIA Does Not Bound the Broad Scope of Preemption It Seeks.

For the reasons discussed above, the Commission should not pursue CTIA's proposed preemption based on § 253. However, if the Commission does consider this proposal, it should recognize that CTIA's request is ill-defined and potentially sweeping in effect.

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[69] For this reason, Congress had no need to include an exemption for § 332(c)(7) in § 253; doing so would have been redundant. The "nothing in this chapter" phrase had the exact same effect.

[70] *Sprint*, 2008 U.S. App. 19316, * 9; Conference Report, pp. 207-208. In § 332(c)(7)(B), Congress identified "limited circumstances" (Conference Report, p. 208) in which local authority was limited, but CTIA does not (and cannot successfully) argue that any of those limitations support the broad preemption it seeks.

[71] Conference Report, p. 208.

As an initial matter, CTIA seems unable to clearly and consistently explain what it wants. In the Petition's Summary, CTIA urges the Commission to preempt local ordinances "that subject wireless siting applications to unique, burdensome requirements, such as those treating all wireless siting requests as requiring a variance."[72] Under this formulation, CTIA asks the Commission to preempt any state or local ordinance that imposes "unique" and/or "burdensome" requirements on wireless carriers. CTIA offers no definition of "unique" or "burdensome" for purposes of framing a rule of preemption, and therefore leaves the Commission and the affected governments to guess at what CTIA believes should be preempted.[73] Elsewhere, CTIA drops the introductory phrasing and requests preemption of requirements that treat all wireless siting requests as requiring or "effectively" requiring a variance.[74]

Whatever the formulation, CTIA seeks a preemption order that is poorly defined and potentially sweeping in scope. As an example of an ordinance that would be preempted, CTIA mentions a Vermont community's ordinance with "a setback requirement of between several hundred feet and fifteen hundred feet."[75] CTIA complains that such an ordinance "effectively requires a variance to construct a wireless facility in that community."[76] Although CTIA apparently views this ordinance as an insurmountable obstacle, CTIA does not explain why it is

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[72] CTIA Petition, p. iii.

[73] Under CTIA's proposal, the Commission would need to decide when an ordinance had a "unique" impact on wireless siting requests. For example, to satisfy a "uniqueness" requirement, would the ordinance need to be directed just at wireless facilities to support telecommunications service, or would broader ordinances – such as an ordinance that applies to any antennas that support wireless services, including antennas that support electric utility operations or unregulated communications services (such as wi-fi) – be sufficiently "unique" to warrant preemption? CTIA fails even to offer a rationale for the uniqueness requirement or any other basis to answer such questions. Similarly, CTIA provides no limiting principle to distinguish between "burdensome" and "not burdensome" ordinances.

[74] For example, on page 38, CTIA states that it seeks preemption of "zoning ordinances that require variances for all wireless siting applications," while on page 35, CTIA adds the phrase "or effectively require" to the above formulation.

[75] CTIA Petition, p. 36.

[76] *Id.*

not possible for any wireless service provider to comply with this ordinance. In any event, this example shows that the preemption that CTIA seeks would embroil state and local governments, on the one hand, and the wireless industry, on the other hand, in endless disputes about whether an ordinance effectively requires a variance in order to build a wireless facility. CTIA fails to address such issues as whether its proposal would preempt an ordinance that requires a variance for an antenna array on a large tower but allows the installation of smaller antennas, such as some of the antennas used by distributed access service ("DAS") providers. The result of adopting CTIA's ill-defined proposal would likely be a dramatic increase in court litigation over such disputes.

Also, because of the lack of clarity of CTIA's proposal, it is unclear whether CTIA's target is only the need to obtain a variance. Relief that one city may require through a variance, in another city may need to be obtained through some sort of special permit.[77] CTIA simply does not provide a record to enable the Commission or other interested parties to understand the scope or effect of its proposal.

In sum, CTIA's proposal is inconsistent with § 253, directly at odds with § 332(c)(7), and so poorly defined as to have no clear limits. Like the other proposals discussed above, it should be summarily dismissed.

[77] Special use permits are sometimes also referred to as conditional use permits or special exceptions, among other terms. *See generally, Zoning and Land Use Controls,* § 44.01[1] - [3] (Matthew Bender & Co. 2008) (explaining the concepts of special permits and variances).

IV. CONCLUSION

The Commission has all the information it needs to conclude that CTIA's proposals directly contravene § 332(c)(7). The Commission should dismiss the CTIA Petition without hesitation.

DATED: September 29, 2008

Respectfully submitted,

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